

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2**

**Peacock Productions of NBC Universal Media, LLC,
Employer**

- and -

Case No. 2-RC-092111

**Writers Guild of America East, Inc.,
Petitioner**

DECISION AND DIRECTION OF ELECTION

Peacock Productions of NBC Universal Media, LLC (“the Employer”) is a television production company located in Manhattan’s Rockefeller Center. The Writers Guild of America, East, Inc. (“the Petitioner”) filed a petition with the National Labor Relations Board under Section 9(c) of the National Labor Relations Act, as amended (“the Act”) seeking to represent a unit of all part-time and full-time freelance and “run of show” producers, associate producers and casting producers, excluding all other employees.

Under a petition filed under Section 9(b) of the Act, a hearing was held before a hearing officer of the National Labor Relations Board.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to the Regional Director, Region 2.

Based upon the entire record in this matter¹ and in accordance with the discussion below, I conclude and find as follows:

1. The Hearing Officer’s rulings made at the hearing are free from prejudicial error and are affirmed.

2. The parties stipulated and I find that the Employer is a Delaware corporation with an office and place of business located at 30 Rockefeller Plaza, New York, NY, the only facility involved herein. The Employer produces long-form, documentary-style, non-fiction programming primarily for distribution over cable television. Annually, in the course and conduct of its business operations, the Employer derives gross revenues in excess of \$100,000, and purchases and receives at its New York, NY facility goods and materials valued in excess of \$5,000 directly from suppliers located outside the State of New York.

¹ The briefs filed by the parties have been duly considered.

Accordingly, I find that the Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.

3. The parties stipulated and I find that the Petitioner is a labor organization within the meaning of Section 2(5) of the Act.

4. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and 2(6) and (7) of the Act.

As stated above, in its petition, the Petitioner seeks to represent all part-time and full-time producers, associate producers and casting producers who work as “freelancers” on a specific project, or who work on a more extended temporary basis, which is referred to as “run of show.” The Employer does not contest that the petitioned-for classifications share a community of interest sufficient to find that the proposed unit is appropriate.² The only issue presented was whether the freelance and “run of show” producers are supervisory. The Petitioner will not proceed to an election in any other unit found to be appropriate.

The Employer contends that the freelance producers and the “run of show” producers are supervisors within the meaning of §2(11) of the Act and, therefore, must be excluded from the unit. Specifically, the Employer argues that the freelance and “run of show” producers have the authority to assign and responsibly direct work, and to effectively recommend the hire, discharge and discipline of the freelance and staff associate producers, the crew, and the editors.

In contrast, the Petitioner asserts that the disputed producers do not exercise independent judgment in making assignments. Rather, the location of the assignment is dictated by the storyline of the show and work hours conform to industry standards, and the overall tasks performed by the associate producers, the crew and the editors are well-defined and routine. Further, the Petitioner submits that while the producers direct work in a collaborative sense, the evidence is insufficient to find that the producers are held accountable for the work performance of the associate producers, the crew, or the editors, and therefore, they do not responsibly direct within the meaning of Section 2(11). Regarding the authority to effectively recommend hire, the Petitioner argues that while the producers may request particular individuals to be assigned or transferred to their project, or make hiring referrals, the record establishes that management does not always accommodate these preferences and that the producers do not participate in the hiring process. Finally, the Petitioner argues that the record does not demonstrate that the disputed producers effectively recommend promotion, discipline or discharge; rather, their feedback is merely reportorial. In the alternative, the Petitioner argues that even if the producers possess some indicia of supervisory status, the crew is not comprised of “employees,” and therefore, the producers do not exert supervisory authority within the meaning of Section 2(11).

I have considered the evidence and arguments presented by the parties on this issue. As more fully discussed below, I find that the freelance and “run of show” producers are properly included in the unit, along with freelance and “run of show” associate producers and casting producers. The record does not establish that they effectively recommend hire, discipline and

² Staff producers, staff associate producers and staff casting producers are not encompassed by the petitioned-for unit.

discharge, nor do they exercise the requisite independent judgment regarding assignment, and no evidence substantiates that they are held accountable for directing work. Accordingly, the producers do not possess the level of authority necessary to find them to be supervisors excluded from coverage of the Act.

To provide a context for my discussion, I first will provide an overview of the Employer's operations and the record evidence concerning each of the supervisory indicia mentioned above. Then, I will present the facts and reasoning that support each of my conclusions on this issue.

FACTS

A. OVERVIEW OF OPERATIONS

The Employer is a mid-sized television production company affiliated with NBC, and engaged in the business of producing and selling documentary or fact-based programming to various cable networks and internal clients, such as, MSNBC.

At a minimum, the Employer produces 200 – 250 hour-long episodes every year. Each episode typically requires twelve weeks of work which stretches over a period of about three to four weeks in pre-production, one week in production, and about six to seven weeks in post-production. Although the content and format vary depending on the subject matter, each episode usually includes narration, interviews and event re-enactments with actors on location. A series consists of six episodes per television season. The Employer may use the same producer and associate producer throughout the season, and sometimes retains the same personnel over the course of several seasons. The Employer also produces special projects referred to as “crashes” which cover a specific topical event. Because these special one-hour programs require an expedited production schedule, several producers and associate producers may be assigned. As an example, a show called “Superstorm Sandy,” which aired on the Weather Channel, required the collaboration of six producers and six associate producers in order to complete the project in a matter of days.

The top management team related to the above-described operations is comprised of: General Manager/Executive Vice-President, Sharon Scott; Senior Vice-President of Programming, Knute Walker; and, the Senior Vice-President of Development, Benjamin Ringe. At this management tier, the focus is project creation and development through direct contact with clients.

Senior VP of Programming, Knute Walker, testified that his position primarily involves negotiating contracts with clients. He is also the liaison for programs produced for NBC affiliates. He maintains a high level of oversight for these productions and directly supervises the director of operations, the senior producers, the supervising producer, and the line producers. It is not in dispute that the aforementioned titles are managerial and/or supervisory.

For every show, Walker meets with the Director of Operations, Danielle Bibbo, who manages finance and strategy, and one of the senior producers to develop a budget for the

production. They consider, among other things, a base number for crew days, and the cost of licensing or permit fees for music and locations. The senior producers reporting to Walker are: Gretchen Eisele; Lloyd Fales; Elizabeth Fischer; Colleen Halpin; Keith McCay; Loren Michelman; and, Betsy Wagner. As a general rule, the senior producers simultaneously manage about four projects; however, the number of projects varies, especially where the senior producer oversees the entire season of a series. The line producers, who seem to be involved in more complicated projects, track the budget as the logistics unfold during production.

The Employer employs a core staff of permanent full-time producers and associate producers. While it appears that the overall duties of the staff producers are the same as the freelance producers, I note that to the extent that the testimony of Staff Producer Kimberly Ferdinando is inconsistent with the freelance producers, I will rely more heavily on the experience of the freelance producers because the staff producers are not encompassed by the petitioned-for unit. The record does not disclose the total compliment of staff producers or staff associate producers, nor is there evidence regarding the ratio of staff to freelance employees.

The Employer also maintains a fluid group of freelance producers and associate producers. In that regard, the Employer contracts with an employment agency for most of the freelance referrals in these classifications. Pursuant to the agency contract, the Employer may hire freelance employees to work continuously, but not for a period exceeding 52 weeks. After 52 continuous weeks of work, the contract requires that the freelance employees either take a 6 month hiatus or convert to temporary staff positions, which are referred to as "run of show." The record does not fully explore the process or frequency with which the freelance producers and associate producers are converted to full-time staff.

Supervising Producer Ann Kolbell oversees the freelance producers and freelance associate producers. The record demonstrates that she has the authority to assign and transfer freelance employees to various projects.

The field production crew consists of the director of photography, cameramen, sound and lighting technicians, and other film assistants. Although the crew may be comprised of NBC staff, the Employer commonly hires freelance employees who work on a daily hire or project-to-project basis. The casting producer is primarily responsible for finding actors who have a physical likeness to the subjects in the story. It is unclear whether the casting director is solely a freelance position or whether the Employer also employs staff casting producers for these productions.³

Finally, the editors work in the post-production phase of the project. Together with the producer and the senior producer, the editors work with the raw footage and shape the episode. Upon upper management's review, the "final cut" is delivered to the client for broadcast.

³ Notably, the community of interest in the petitioned-for unit is not in dispute and therefore, the record almost exclusively centered on the supervisory status of the freelance producers.

B. PRE-PRODUCTION WORK

As stated above, in the development stage, Senior VP of Programming, Knute Walker, Director of Operations, Danielle Bibbo, and the senior producer(s) on the project create the initial budget for a production. After establishing the parameters of the budget, the producer may request additional shoot days or some other adjustment in the budget allocations. Frequently, management will reallocate costs among the budget items due to changed circumstances.

The senior producers are responsible for the “look” of the show, which is constrained by the budget and the client’s preferences. As such, the senior producer provides editorial input throughout the production process. According to Senior Producer Colleen Halpin, she merely sets the deadlines for the shoot schedule and the “cuts” which she reviews as the project progresses. While Halpin retains final approval, she claimed that the producer has complete discretion to plan, delegate and supervise the execution of the project.

It appears that the producers primarily perform the pre-production work at the Employer’s facility. The producer’s duties include researching the subject matter and writing the original content of the show. The producer creates the list of experts, interviewees, and the characters in the story. The producer also contributes to the detailed planning for the logistics of the actual shoot. Freelance Producer Daniel Bowen testified that his ultimate responsibility is to create a unique way of articulating the story that the senior producer has assigned to him.

Several “run of show” producers – David Van Taylor, David Mettler and Steve Rivo - elaborated on the extent of the senior producer’s editorial input and the limitations placed on their discretion.⁴ Their corroborative testimony demonstrates close supervision throughout the pre-production phase. As an example, one of the primary duties of the producer is to write the “treatment” which outlines the story and the important elements of the shoot. All of these witnesses testified that their senior producers reviewed, edited and sometimes rewrote the treatment prior to its release to the network executives or the client.

More specifically, Van Taylor testified that the senior producer dictated various aspects of the production schedule, the format of the show, and the particular equipment to be used in production. Similarly, Mettler testified that for an episode of “Disappeared,” Senior Producer Liz Fischer discussed possible storylines, how the treatment should be broken down into acts, and how the re-enactments and interviews should be shot. In addition, Rivo recalled a particular incident regarding content. For an episode of “Caught on Camera,” Rivo and the associate producer found amateur videos of the event on which the episode was based. They met with Senior Producers Loren Michelman and Keith McCay to present the videos. Rivo did not have discretion to deviate from the treatment and integrate the footage without the senior producers’ approval.

For an established series, the producer’s discretion appears to be even more circumscribed. Freelance Producer Lise Zumwalt testified that by the time she was hired for a series called “Killer Instincts,” the format was set and she was not authorized to exercise any

⁴ It does not appear that any of the freelance producers worked with Halpin as their senior producer.

discretion in that regard. Van Taylor, Mettler, and Rivo corroborated that when they were hired for an ongoing series, the format was established and they were instructed to use previously aired episodes as the template for how to shoot an episode.

Only one employee witness, Staff Producer Kimberly Ferdinando, appears to be involved in the early conceptual stages of a project and in devising the budget. Notably, the job description offered by the Employer lists the responsibilities of the producer as “work[ing] directly with senior producers to help write and produce non-fiction, non-scripted content for distribution.” (Er Ex 36). It does not include project development and finance. Again, the staff producers are not encompassed by the petitioned-for unit.

With respect to the associate producer, their primary role is to coordinate the logistical aspects of the shoot. The record demonstrates the collaborative nature of the work done in preparation for filming. As an example, in an e-mail dated November 29, 2012, Freelance Producer Dan Bowen, as an experienced “old-timer,” provided Freelance Associate Producer, Daniel Mehrer, with informal feedback and guidance “from both a logistical and creative point-of-view.” (Er Ex 14). Van Taylor and Mettler also testified that they work with the associate producer to create the shoot schedule which is the guide for the field work. Rivo testified that on his first few episodes as a new producer on “Disappeared” and “Fatal Encounters,” the more experienced associate producer created the shoot schedule for him. Revising the shoot schedule throughout the production process often requires input from the senior producer and the associate producer.

C. HIRING AND ASSIGNMENT OF PRODUCER AND ASSOCIATE PRODUCER

Supervising Producer Ann Kolbell testified that once a project is lined-up, she works with the Senior Producer to find an available producer with the matched skill set for the job. All of Petitioner’s witnesses corroborated this process for hiring freelance producers. As an example, Van Taylor testified that Kolbell and Senior Producer Lloyd Fales interviewed him when he was first hired as a freelance producer. Rivo and Annie Wong testified that they were interviewed by Kolbell and Senior Producer Elizabeth Fischer for their freelance producer positions. Zumwalt testified that she was also interviewed by Kolbell and a senior producer prior to her hire as freelance producer.

The same initial hiring process appears to be used for hiring the freelance associate producers. As an example, Katherine Ferraguto interviewed with Kolbell and Senior Producer Keith McCay when she was first hired as an associate producer. Alexander Baertl testified that Kolbell and Senior Producer Gretchen Isoloy interviewed him for the position of freelance associate producer.

The documentary evidence suggests that all freelance producer and associate producer resumes and referrals for hire must be approved by the senior producer and once that approval is granted, Kolbell is contacted for on-boarding instructions.

With respect to assignment, the record indicates that Kolbell determines the assignment of the associate producer to a particular project, depending on availability and skills. As an

example, in an e-mail dated August 3, 2011, Kolbell asked staff producers for feedback on Freelance Associate Producer, Katharine Ferraguto, who had just recently been hired. (Er Ex 3). This e-mail also shows Kolbell's authority to assign and reassign the freelance population based on availability. Erica Matson, a "run of show" associate producer, testified that Kolbell makes the ultimate decision as to her project assignments and determines her availability for transfer to new projects.

The record evidence regarding the producer's authority to effectively assign a particular associate producer varied. In that regard, Staff Producer Kimberly Ferdinando testified that sometimes her request was granted and sometimes it was denied because of a scheduling conflict. On his first project, Freelance Producer Daniel Bowen testified that he requested a strong associate producer who was familiar with the Employer's procedures; Kolbell complied and assigned an experienced associate producer. The most common situation described by the freelance producers is that Kolbell simply informs them of the assigned associate producer without their input.

Finally, although the producer may request an additional associate producer, the record does not reveal the frequency with which this occurs or whether the requests are granted or denied. Regarding whether producers can effectively recommend the removal of an associate producer, Rivo recalled a specific incident during pre-production for an episode of "Fatal Encounters." In that regard, Rivo informed Senior Producers Lisa Fisher and Lloyd Fales that the assigned Associate Producer, Therese Palaia, was too inexperienced, needed training and should be replaced. Rivo's request was denied.

D. HIRING THE PRODUCTION CREW

According to Senior VP of Programming Knute Walker, the producers have input into the selection of their crew, especially the cameraman. Although Walker claimed that the producer has some leeway to negotiate salaries, the documentary evidence shows the Employer's strong disinclination to allow deviation from the fixed rate. A guideline titled "On-boarding Procedure" states that all crew hires should go through the crew office and that office will negotiate rates and options for payment directly with the crews. (P Ex 4).⁵ "You should not negotiate payment on your own." These procedures were developed by: Director of Operations Bibbo, NBC Employment Attorney Stephanie Franco; NBC Production Attorney Beth Label; Director of Production Carmella Tripodi; Senior Director of Finance Mindy Boyle and HR Representative Stacey Green. The freelance producers did not provide input and had no involvement with creating this procedure.

While Staff Producer Kimberly Ferdinando appears to take a "hands on" approach by directly contacting her preferred crew, most of the producers rely on the senior producer, the line producer or the associate producer to hire local film personnel.

⁵ Pursuant to subpoena, the Employer produced the document identified as P Ex 4. The Union offered it as a business record and the Hearing Officer reserved ruling. I hereby receive P Ex 4 in evidence as part of this record as a business record.

Ferdinando testified that if a cameraman whom she prefers is available, she instructs the crew office to put him “on hold” for her project, pending the formal hiring process. The parties adduced very little testimonial evidence regarding the workings of the crew office. A document titled “Crew Booking Procedure” states that the crew office encourages any recommendations because “we are always looking to increase our lists of available and acceptable crews.” (P Ex 4). Specific instructions include “fill[ing] out a Crew Request in the peacock.crew-requests file” and to “[b]e sure to obtain Senior approval” and add their name to the request form. The submission of a request form indicates that the producers’ referrals for hiring crew members are vetted by management. Further, the record is unclear as to whether Ferdinando selected the cameraman from a pre-approved list generated by the crew office.

With respect to the director of photography, it appears that management prefers a select group who are regularly hired for shoots on location. Van Taylor, Mettler, Zumwalt and Wong have referred certain directors of photography who were sometimes hired; however, the producers did not participate in the interview or any other aspect of the hiring process, including setting the terms and conditions of employment.

With respect to the talent, the casting director selects a group of potential actors based on photographs of the real-life people involved in the story that the actors will portray, and provides their headshots to the producer for selection. It appears that HR Representative Teryle MacDonald and NBC Production Attorney Beth Lobel review all casting requests and then the casting director follows through with the Employer’s on-boarding procedures.

Although Ferdinando stated that she has authority to find the talent and sign them onto the project, the record demonstrates that, more typically, the freelance producers select the actors from the casting director’s pool based on physical appearance. Mettler testified that for one episode of “Casino Secrets,” the associate producer hired the actors because no casting producer was assigned to this project. Wong testified that her associate producer once found the actors on “Craig’s List” after advertising on this website. The record does not indicate whether the associate producers in these examples were staff or freelance employees.

E. PRE-PRODUCTION SCHEDULE AND HOURS

The production team usually works during the Employer’s normal operating hours, from about 10:00am to 6:00pm, Monday through Friday, which is the industry standard. Although Freelance Producer Bowen testified that he sets the associate producer’s work schedule at all phases of production, other freelance producers disputed that they had such authority. “Run of Show” Producer Mettler stated that he is not aware that he has the authority to assign different hours, however, as deadlines approach, he and the associate producer have worked longer hours. “Run of Show” Producer Van Taylor claimed that he and his associate producer discuss what tasks need to be completed by a certain date, but they do not usually discuss specific hours to report to work. “Run of Show” Producer Zumwalt corroborated that the associate producer generally works normal office hours, however work expands as the job dictates. Zumwalt stated that she never informed her associate producers of specific hours.

F. PRODUCTION: THE FIELD WORK

The storyline of the project determines the location of the shoot. The production team spends about a week on location filming interviews with the eye-witnesses, the actors' recreation of the event, commentary with the host, and any other shots of the location itself that are related to the project's storyline.

The senior producer monitors the progress of the production. Halpin testified that she serves as a resource for the producer should any problems or questions arise. Ferdinando stated that throughout the production process, she directs any questions to the senior producer because she is "the boss." Similarly, Mettler, Rivo and Van Taylor testified that if something goes wrong during the shoot, if the shoot goes very late, or if the shoot deviates from the plan in an important way, they reach out to their senior producer for guidance and approval before implementing any changes. In that regard, Rivo recalled an incident when an interviewee suddenly pulled out of the shoot. He had to check with the senior producer to make sure that it was still okay to move forward with the story without that witness. During the two projects that Zumwalt worked on as freelance producer, she emailed production reports from the field on a daily basis to Series Producer Lloyd Fales, which detailed the production's progress.⁶

Notwithstanding this oversight, the producer directs the field work. Mettler analogized his role as the producer to that of a quarterback on a football team - he calls the plays and executes the game plan during a shoot. The record makes clear that the extent of the direction, the degree of oversight, and the collaborative nature of the work combine in different ways depending on the experience level of the personnel and the complexity of the shoot.

The record demonstrates that the producer's direction of the crew is collaborative. Each member contributes particular skills, knowledge and expertise to help the producer execute a shoot. The producer's relationship with the director of photography ("DP") illustrates the collaboration involved in the creative process. As Rivo explained, the DP is responsible for everything that happens on the inside of the video frame, such as, how things are lit, the motion of the camera and the composition of the frame. The DP is essentially responsible for making the image suit the specific technical specifications required for the show. To that end, Rivo and the DP have discussed what lens to use, how close to shoot, the master shot, and whether they need another take.

As mentioned above, the associate producer is responsible for coordinating the logistical aspects of the shoot, including among other things, finding props, contacting the actors and interview subjects, gathering releases, arranging transportation, and ordering the catering. "Run of Show" Associate Producer Katherine Ferraguto testified that her overall duties in the field are to make sure that everything goes smoothly and that the production is on time. Associate Producer Alexander Baertl testified that on every show, the senior producer gives him a rundown of his general duties. Mettler, Zumwalt and Rivo testified that the Employer mostly hires

⁶ It appears that the series producer is a managerial/supervisory position and may be used interchangeably with "line producer."

experienced associate producers who know what is expected based on well-established industry practice. Similarly, Wong testified that the associate producer assigned to her project had been on the series for some time and that she knew the "lay of the land." The job description for the associate producer lists as one of the qualifications/requirements, "at least three years editorial production experience in longform programming for network or cable operations." (Er Ex 35).

The producer monitors the work of the associate producer and reports positive and negative feedback to the senior producer, the line producer and Kolbell. The record does not indicate, however, that this feedback necessarily impacts the associate producer's terms and conditions of employment. As an example, by e-mail dated September 19, 2011, Van Taylor gave positive feedback on freelance associate producer Terese. (Er Ex 25). Nonetheless, Kolbell subsequently informed Terese that she would not be reassigned. In another case, Associate Producer Matson testified that after a year, Senior Producer Keith McCay, with whom she had never directly worked, informed her that she was being converted from freelance to "run of show" based on feedback from other producers.

Further, the record does not establish that the producers participate in the decisional process for personnel actions concerning the associate producers. In that regard, staff associate producers receive formal evaluations written and signed by their senior producer. Although Senior VP of Programming Walker and Senior Producer Halpin testified that the freelance producer's comments and opinions concerning the quality of the associate producer's work are given great weight, none of the evaluations were proffered into evidence to show that the freelance producers' feedback impacted the appraisal. Further, Kolbell gives verbal feedback to the freelance associate producers at the end of the project; notably, the producer does not attend the meeting. Kolbell testified that irrespective of whether the producer is freelance or staff, she considers the producer's feedback in deciding whether to convert a freelance associate producer to "run of show." Again, no documents or concrete examples regarding the decisional process were offered into evidence to support the testimony of Kolbell.

Although Ferdinando claimed that she is held responsible for any errors that the associate producer makes, no specific examples were adduced on the record. As a staff producer, Ferdinando received written evaluations of her work performance, which were not introduced in evidence. No documentary evidence was introduced to establish that the producers - staff or freelance - are held responsible for the associate producer's work.

Finally, regarding the budget, Walker and Kolbell testified that the senior producer is responsible for bringing a project in on budget, even though the producer bears some responsibility to keep the shoot within the set budget. Rivo testified that when he was going to go over budget on licensing fees, he was obligated to tell the senior producer and ask for approval for doing so. Similarly, Mettler testified that if the production is going over budget by more than a couple hundred dollars, he calls his senior producer for approval. By e-mail dated January 17, 2012, Kolbell informed Mettler that although she approved his expenses, he had to keep his meal expenses under \$50 per day. (Er Ex 28). This demonstrates that the producers have very little discretion and are closely supervised regarding the budget.

Freelance Producer Bowen testified that the producer is responsible for making the budget work when things go wrong in the field. His testimony described hypothetical situations, in part, because he has only five months experience working for the Employer.

G. PRODUCTION SCHEDULE AND HOURS

Notwithstanding the shoot schedule, ten to twelve hour days are generally expected for this type of field work. The record demonstrates that the crew works until the producer decides that it's a "wrap." Hours are generally dictated by the workload and deadlines. Some producers claimed that they told the associate producers to come in early and work late; others emphatically denied that they assigned hours. Although the associate producers are not paid overtime pay for working longer than scheduled hours, they may be granted a "comp day" by either the senior producer or Kolbell.

Often, due to the vagaries of field work, an additional day of shooting is required. The record demonstrates that the producer must get approval from the senior producer before moving forward. Mettler testified that if he wants to add another day of shooting or needs to shift a scheduled shoot day, he must ask his senior producer and line producer for approval. Van Taylor stated that in consultation with the senior producer, he has made changes in the number of shoot days.

With respect to the crew, the record indicates the crew may contract with the Employer to receive overtime payment past a ten-hour workday. Even though the record shows that the producer determines when to quit for the day, "Run of Show" Producers Van Taylor and Mettler testified that they do not have the authority to grant overtime pay. In that regard, an e-mail dated August 7, 2012, indicates that Line Producer Peter Burke calculated the overtime payment for the DP. (Er Ex 27). Mettler merely confirmed that the overtime appeared accurate based on the time that they finished the shoot. The e-mail demonstrates that Mettler was not involved in negotiating or authorizing the overtime pay for the crew member. "Run of Show" Producer Rivo corroborated that he never signed-off on overtime invoices. Staff Producer Ferdinando's testimony, unsupported by documentation, that she signs the overtime bills for the camera and sound technicians and then sends it to the Employer's accounting department is not only contradicted by the freelance producers, it seems at odds with a document titled "Who Does What at Peacock." (P Ex 6). This document states that all finance inquiries should be directed to the line producer on the project, the senior producer, or specific managers, such as, Pat Nugent, Erika Grothues and Lisa Fisher. Management did not direct the crew to the freelance producers as a resource for guidance on finance issues.

With respect to the producer's authority to approve leave requests, Kolbell testified that an associate producer must first contact the producer for approval before contacting her to request a day off. "Run of Show" Associate Producer Erica Matson and Ferdinando corroborated that the associate producer gets permission from the producer and then contacts Kolbell because she keeps track of employees' time. However, in e-mails dated September 18 and 24, 2012, the associate producers appear to merely inform Ferdinando of their absence. (Er Ex 12). Although Ferdinando testified that she approved these requests, it is noteworthy that the Employer did not provide the responsive e-mails that would show that she authorized the leave.

In direct contradiction, Van Taylor and Rivo both testified that they have never approved any leave requests from the associate producers. Rather, the senior producer and Kolbell authorize the associate producer's leave requests, and the producers are merely informed as a courtesy. In his testimony, associate producer Baertl testified that he has only requested time off once and he had to clear this with his senior producer. Baertl testified that he understands the procedure to be that he seeks approval for leave from his senior producer and then from Kolbell because these two are his managers. Once they have approved his leave request, Baertl tells his producer that he will be out. Baertl's testimony is consistent with Kolbell's instructions in a document titled "Who Does What at Peacock?" (P Ex 6). Regarding time off, Kolbell wrote that any requests by freelance producers and associate producers "should be discussed first with your project senior [producer] and then sent to Ann Kolbell with a cc to Katie Hannafin [the front desk assistant]."

H. POST-PRODUCTION

The post-production phase usually takes about seven weeks to complete and this work is performed at the Employer's facility. During the first week, the producer gathers the materials from the shoot, chooses sound bites, reads the transcripts and then writes a script. The record clearly demonstrates that at this phase, the senior producer reviews the script and provides notes which are then incorporated into the script. Van Taylor also stated that there have been instances when the senior producer has made significant changes and completely rewritten his script. He also recalled instances where the senior producer has directed him to go back in the field for another day of shooting to more completely cover the story.

After approving the script, the senior producer presents it to the client for review. The producers do not have direct contact with the client at any point in the post-production process. Based on the client's feedback and revisions, the producer revises the script in consultation with the senior producer. After the script has been fully vetted by the senior producer and the client, the editing process begins.

During the editing phase, the producer works closely with the editor to build "cuts." The cuts are made in the following order: the radio cut, the rough cut and the fine cut. The radio cut is the audio, such as, the voiceover narrations. The rough cut builds on the radio cut by adding the shots and attempting to tell the story using all the footage. The fine cut requires further editing to use the sequences that best tell the story.

The producer screens the tape, reviews materials, gathers information, and writes the voiceover. The editor operates machinery to assemble the video. The associate producer is responsible for managing all the footage by creating a clip log of everything that was shot in the field. Although the associate producer may assist in finding footage or finishing up the field work by returning rented props and equipment, the associate producer's role in post-production is minimal. In fact, the associate producer can be reassigned to begin pre-production on another project before post-production is finished.

Again, the record demonstrates the senior producer's close involvement in the editing process. All of the witnesses corroborated that the senior producer reviews each cut and provides detailed notes about what is working, what is not, what needs to be changed and how it should be changed. Rivo specifically recalled that the senior producer provided a lot of oversight for his work on "Caught on Camera," "Disappeared" and "Fatal Encounters," because the particular format was set for these shows.

I. HIRING, ASSIGNMENT, AND DIRECTION OF THE EDITOR

The record indicates that while the senior producers and the producers can request a particular editor, it appears that they are usually assigned to the project by the senior producer. Nugent has the authority to assign. Mettler recalled one project where the senior producer asked him for a referral. Mettler recommended an editor with whom he had worked; however, he was not involved in the interview which was conducted exclusively by the senior producer. Like the assignment of associate producers, some of the producers testified that they had no knowledge of the editors who were working for the Employer and therefore, did not make any specific requests.

Although Staff Producer Ferdinando testified that she evaluates the editor's work, "Run of Show" Producers Mettler and Rivo stated that they merely provided feedback to the senior producer. No documentary evidence was introduced to show that the producers' comments result in an employment action for the editors affecting their terms and conditions of employment or that the producers are held accountable for their work.

Senior VP of Programming Walker testified that the producer is responsible for the editor's work. Senior Producer Halpin and Ferdinando testified that the producer directs the editor with specific instructions regarding footage. The freelance producers testified that the editors are clear about the expectations of their job, that the senior producer is directly involved with instructing the editor to make certain changes, and that the relationship between the producer and the editor is collaborative.

Finally, the record demonstrates that the producer and the associate producer return to working the Employer's normal office hours of about 10:00am to 6:00pm during the post-production part of the project. Like the other phases of the project, the record does not demonstrate that the producers have the authority to schedule hours or grant overtime during post-production.

ANALYSIS

In defining "employees," Section 2(3) of the Act specifically excludes supervisors as,

any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the

foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To establish that the individuals are supervisors, the party asserting supervisory status must show: (1) that they have authority to engage in any 1 of the 12 enumerated supervisory functions; (2) their “exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment;” and, (3) that their authority is exercised “in the interest of the employer.” *Oakwood Healthcare, Inc.* 348 NLRB 686, 687 (2006). A party can prove the requisite supervisory authority either by demonstrating that the individuals actually exercise a supervisory function or by showing that they effectively recommend the exercise of a supervisory function. *Id.* at 688.

The party asserting that an individual has supervisory authority has the burden of proof. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 713 (2001); *Dean & DeLuca New York, Inc.*, 338 NLRB 1046 (2003). “[W]hen the evidence is in conflict or otherwise inconclusive on particular indicia or supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989); *Brusco Tug & Barge, Inc.*, 359 NLRB No. 43 (2012). Purely conclusory evidence is not sufficient to establish supervisory status; rather, the party must present evidence that the employee actually possesses the Section 2(11) authority at issue. *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). A “paper showing” or testimony merely asserting generally that individuals exercised certain supervisory duties is not sufficient to meet the burden of proof. Like a job title, a job description is not determinative of supervisory status. *Atlantic Scaffolding Co.*, 356 NLRB No. 113 (2011). “[M]ere inferences or conclusory statements, without detailed, specific evidence are insufficient to establish supervisory authority.” *Alternate Concepts, Inc.*, 358 NLRB No. 38, slip op. at 3 (2012). Rather, the testimony must include specific details or circumstances demonstrating the existence of supervisory authority. *Avante at Wilson, Inc.*, 348 NLRB 1056, 1057 (2006). Any lack of evidence in the record is construed against the party asserting supervisory status. *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 fn. 8 (1999).

In applying the above-mentioned case law, and based on the record evidence, I conclude that the evidence is insufficient to establish that the employees at issue, the freelance and “run of show” producers, are supervisors as defined by Section 2(11) of the Act.

A. EFFECTIVELY RECOMMEND HIRE, FIRE, DISCIPLINE

With respect to the authority to effectively recommend hire, the Board defines the power to effectively recommend as meaning that the recommended action is taken with no independent investigation by superiors.” *Family Healthcare, Inc.*, 354 NLRB 254 (2009); *ITT Corp.*, 265 NLRB 1480, 1481 (1982); *Wesco Electric Co.*, 232 NLRB 479 (1982). Mere participation in the hiring process, absent the authority to effectively recommend hire, is insufficient to establish 2(11) supervisory authority. *Conn. Humane Society*, 358 NLRB No. 31 (2012); *Waverly-Cedar Falls Health Care*, 297 NLRB 390, 392 (1989), *enfd.* 933 F. 2d 626 (8th Cir. 1990).

In the instant case, Supervising Producer Ann Kolbell is in charge of recruiting freelance associate producers. Kolbell and the senior producer on the project interview associate producers for hire, without the participation of the producers. To the extent that the producers may request a particular associate producer, Kolbell merely attempts to accommodate the producer's preferences. Frequently, the producers have no input on assignment. Kolbell assigns associate producers based on their availability and suitability to that project. In contrast to conclusory testimony offered by the Employer, the detailed testimony of "Run of Show" Producer, Steve Rivo, illustrates that the authority to assign exclusively resides with the senior producers, the line producers and Kolbell.

Regarding hiring the crew, Senior VP of Programming Knute Walker noted that the producer's choices regarding the crew are limited by the budget and location of the project. The record demonstrates that senior producers and line producers often assign the director of photography from a preferred group with prior experience to ensure that the footage will stay within the format and look of prior episodes. Producers merely refer fellow journeymen. As "Run of Show" Producer David Van Taylor testified, over the course of five projects, the senior producer only once asked him to recommend a director of photography. The senior producer independently interviewed and hired the candidate. Further, the associate producer and the producer refer local technicians to the Employer's crew office for hire. In that regard, the documentary evidence shows that the wages are generally fixed and the producers do not negotiate any other terms and conditions for the daily hires. The casting producer or the associate producer find local actors based on their physical resemblance to the real-life people involved in the story and the producer makes a selection. Accordingly, the record is insufficient to conclude that the producers are independently vested with authority to hire and do not "effectively" recommend hire. *Robert Greenspan, DDS*, 318 NLRB 70 (1995)(selections were not demonstrated to be more than experience of a journeyman expertise in determining which employee had the requisite skills or other characteristics to perform the job); *Ryder Truck Rental*, 326 NLRB 1386, 1387-1388, n.9 (1998).

Finally, although producers have sometimes requested the assignment of a particular editor for their projects, the record demonstrates that, like the associate producers, the editor is commonly assigned without the producer's input. Thus, the authority to effectively recommend assignment is sporadic and isolated. *Volair Contractors*, 341 NLRB 673 (2004).

I also note that although Ferdinando testified that she has authority to hire all of the above-mentioned classifications, her testimony was often hypothetical and lacked specific examples. Moreover, as a staff producer, her testimony regarding the authority of the freelance producers carries less weight than the testimony of the freelance producers themselves. Even if some *ad hoc* recommendations for hire may have been followed, the overwhelming record demonstrates that the Employer's supervising producer, senior producers, and line producers retain the authority to hire and assign candidates, many of whom have already been vetted by a temporary employment agency or the crew office. *Atlantic Scaffolding Company, supra*; *Sears, Roebuck & Co.*, 304 NLRB 193 (1991) (conclusory evidence, without specific explanation that the disputed person or classification in fact exercised independent judgment, does not establish supervisory authority).

Regarding the authority to affect promotion, discipline or discharge, the Employer contended that the producers evaluate the associate producers, directors of photography, and the editors and that this feedback affects job status. I find that the fact that the producers may evaluate others' work, standing alone, is insufficient to support a finding of supervisory authority.

The Board, in *Elmhurst Extended Care Facilities*, 329 NLRB 535, 536 (1999), noted that Section 2(11) does not include the authority to "evaluate" in its enumeration of supervisory functions. Thus, when an evaluation does not, by itself, affect the wages and/or job status of the employee being evaluated, the individual performing such an evaluation will not be found to be performing a statutory supervisory function. Here, Supervising Producer Ann Kolbell testified that she did not retain Freelance Associate Producer, Teresa Palaia, based on negative feedback from "Run of Show" Producer, Steve Rivo. I note, however, that the record demonstrates that the freelance producers are merely reporting on the quality of the associate producer's work which is independently investigated by management. Accordingly, the producer's feedback does not, standing alone, affect employment decisions concerning freelance employees. *Arizona Public Service Company*, 310 NLRB 477 (1993); *Pepsi-Cola Bottling Company of Merced-Modesto*, 154 NLRB 490, 493-494 (1965)(individual who reviews service by salesperson, and, if he discovers faults, reports them to the plant manager who makes an independent investigation, is not a statutory supervisor).

Additionally, I note that the senior producers write and sign formal evaluations for the permanent staff associate producers. Although some testimony indicates that the freelance producers' feedback is given a lot of weight in determining personnel decisions, no documentary evidence was introduced to support this assertion. This lack of evidence should be construed against the Employer as the party asserting supervisory status. *Michigan Masonic Home*, 332 NLRB 1409 (2000).

In conclusion, based on all of the above, the evidence is insufficient to demonstrate that the producers "effectively recommend" hire, assignment, discharge, promotion or discipline. Rather, the producer's recommendations are sporadically followed and this authority rests in the next tier in the management hierarchy.

B. ASSIGN AND RESPONSIBLY DIRECT

The Board, in *Oakwood Healthcare, Inc., supra*, clarified the criteria for finding that a putative supervisor "assigns" or "responsibly directs" the work of others, and uses "independent judgment" in doing so. The Board held that the authority to assign refers to "the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties as opposed to discrete tasks. *Id.* at 689. In sum, to 'assign' for purposes of Section 2(11) refers to the ... designation of significant overall duties to an employee, not to the ... *ad hoc* instruction that the employee perform a discrete task." *Croft Metals, Inc.*, 348 NLRB 717, 721 (2006), citing *Oakwood Healthcare, supra*, at 689-90. The authority to make an assignment, by itself, does not confer supervisory status. The putative supervisor must also use independent judgment when making such assignments. *Oakwood Healthcare, supra*, at 692-693.

The Employer contends that the producers assign overall tasks to the associate producers, crew members, and actors; set their schedules; and, assign them to particular locations in the field. I find that the evidence is insufficient to establish that the producers exercise independent judgment in setting the tasks, hours and location during production.

The record is clear that the storyline and budget determine the location of the shoot. The shoot schedule is dependent on the availability of the interview subjects and the allotted number of shoot days as budgeted by upper management. Further, the producer and the associate producer work collaboratively to make and update the shoot schedule which is submitted to the senior producer for review and alterations prior to being finalized.

Television production can entail long workdays in the field. Here, in the event that the shoot extends later in the day or requires an additional day, the producer must obtain the senior producer's approval prior to making any changes in the plan developed in the pre-production phase. The hours in the field are driven by executing the task of gathering the necessary footage to tell the assigned story, and the senior producer decides whether additional or different material is necessary. Notably, during the pre- and post-production phases, the employees work normal office hours of 10:00 am to 6:00 pm, which are set by management in conformity with the industry standard. Although the producer is informed of an associate producer's request for personal time and sick time, the record establishes that after the senior producer approves leave requests, the associate producer informs Kolbell so that the leave time is properly reported.

To be supervisory, the supporting evidence must be sufficient to establish that the producers make assignments tailored to the needs of the work and the particular employees' skill sets, analyzing the employee's skill set and level of proficiency at performing certain tasks to match the work assigned. *Oakwood Healthcare, Inc.*, *supra*, at 695. Where tasks are highly regulated, repetitive, and well known to the employees, the degree of independent judgment is reduced when directing employees in such tasks. *Id.* at 691-693; *Croft Metals*, *supra*, at 721.

In the instant case, the record establishes that the job duties of the associate producers, the crew, and the editors are routine and well-defined in the industry. Obviously, the producers instruct members of a production crew in preparation for and during actual filming; however, any discretion or judgment that the producers exercise in giving directions relates to their own responsibilities to achieve a desired artistic effect. Thus, these instructions are either routine in nature or are motivated by the artistic effect the producers seek to achieve and do not entail the exercise of supervisory independent judgment. *King Broadcasting Co. d/b/a KGW-TV*, 329 NLRB 378, 382-383 (1999).

In its submission, the Employer relies on the Board's decision in, *Superior Bakery, Inc. v. NLRB*, 893 F.2d 493, 496 (2d Cir. 1990) in support of its contention that the producer's scheduling duties make the producer a statutory supervisor. In *Superior Bakery*, the individual found to be a statutory supervisor exercised more than "strictly routine" authority in selecting people necessary to do work at the times he chose. The instant case is easily distinguishable as

the producers in question are merely scheduling slots within the confines of shoot days set by his superiors and the availability of the participants under the close review of his superiors.

With respect to the producer's authority to responsibly direct work, the Board has recognized that the presumption that a producer directs others is unavoidable. *Westinghouse Broadcasting Co. (WBZ-TV)*, 215 NLRB 123, 125 (1974). However, the Board has also held that such direction may not amount to responsible direction within the meaning of Section 2(11). *Id.* The Board has stated that in order to exercise independent judgment, the direction "must be independent [free from the control of others], it must involve a judgment [forming an opinion or evaluation by discerning and comparing data], and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" *Oakwood Healthcare, Inc., supra*, at 693. A judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies, rules, or the verbal instructions of a higher authority. *Id.* In the television industry, the Board has found that producers have the authority to "responsibly direct" other employees where the producers enjoy a level of authority tantamount to "full responsibility from the planning stage through the presentation on the air." *Great Western Broadcasting Corp. d/b/a KXTV*, 192 NLRB 1203, 1204 (1971).

Here, the freelance producers do not exercise independent judgment in relation to the format, look and content of the projects that they undertake. Their work is set within parameters established by the senior producer and upper management. Although producers have some leeway to reallocate resources, they are confined by a fixed budget and any changes to itemized costs must be approved by the senior producer. The record demonstrates that the overall responsibility for the product is vested in the senior producer. Like the producer/directors in *Westinghouse Broadcasting (WBZ-TV)*, *supra*, the producers here are part of an integrated production team in which their skills and responsibilities are joined in a collaborative effort to coordinate and develop a single product.

As an example, the producer confers with the director of photography to find the best angle for a shot. The producer directs the actors and technicians by calling the cues during each scene, however, the crew perform their jobs by exercising discretion and judgment based on their own expertise and experience. The record demonstrates that the producer coordinates with the production team so that they are all working towards the common goal of getting the necessary footage with the established look and format of the show. Thus, the producer's instructions to the crew are either routine in nature, or are motivated by the artistic effect that the producers seek to achieve. Similarly, in post-production, the editor and the producer work collaboratively to create the "cuts" which are reviewed and annotated by the senior producer and client. *McGraw-Hill Broadcasting Co., Inc.*, 329 NLRB No. 48, 456-457 (1999); *citing KGW-TV*, 329 NLRB No. 39 (1999); *Westinghouse Broadcasting (WBZ-TV)*, *supra*, at 125.

Moreover, for direction to be "responsible," the person performing the oversight must be accountable for the performance of the task by the other, such that some adverse consequence may befall the one providing the oversight if the tasks are not performed properly. *Oakwood Healthcare, supra*, at 691-693. To prove accountability, the party asserting supervisory status must show both that the putative supervisor has "the authority to take

corrective action” and can potentially receive “adverse consequences” for the performance errors of other employees. *D & J Ambulette Service*, 359 NLRB No. 62 (2013).

Here, the record contains only the mere assertion that the producer is responsible for the tasks of others and the overall show. Bowen’s claims were largely based on hypothetical situations, rather than actual events that occurred during his brief five month tenure. Senior Producer Halpin testified that she holds the freelance producers accountable because she does not rehire them if she’s not pleased with the way the production went. Her testimony, however, lacked examples or any specifics regarding the criteria used for rehiring freelance producers. The Board has also long-recognized that purely conclusory evidence is not sufficient to establish supervisory status. *Volair Contractors*, 341 NLRB 673, 675 (2004); *The Door*, 297 NLRB 601, 602 (1990).

Further, the Employer failed to proffer any documentary evidence to establish that the freelance producers are held accountable. In that regard, I note that even though the freelance producers are not formally evaluated, the staff producers receive written evaluations. Notwithstanding the Employer’s claim that the staff and freelance producers are vested with the same authority, none of the staff producer’s appraisals were introduced in evidence to show that they are held accountable. Additionally, no evidence was adduced that the producers take corrective action; nor did the record testimony support the conclusion that the producers hold such authority. In the absence of such specific testimonial evidence or any documentation, I find that the producers do not responsibly direct work as defined in Section 2(11) of the Act.⁷

The Employer cites to the Board’s decision in, *Hearst Broadcasting Corp. d/b/a WDTN-TV*, 267 NLRB 326-327 (1983), which is distinguishable. In *Hearst*, the producers were not required to adhere to any format. They could make changes to the content and length of the story, and instruct the reporters how to write the story. They had final authority to change work assignments made by the assignment editors, and submitted reports which could result in discipline. In contrast, here, the run of show and freelance producers are primarily responsible for gathering the footage necessary to tell the story of the show. The content of the story, the format and the look of a show is overseen, edited and approved by the senior producer, the line producer and the client. Thus, the latitude with which the freelance and run of show producers execute their duties does not involve independent judgment and therefore, does not rise to supervisory authority within the meaning of Section 2(11).

Similarly, in its brief, the Employer cites to *Westinghouse Broadcasting Co.*, 195 NLRB 339 (1972) and *Westinghouse Broadcasting Co.*, 188 NLRB 157 (1971), as support for its case. These cases are distinguishable. In these cases, the Board stressed that the producers were completely responsible for the content of the programs. Those producers were more akin to the senior producers in the instant case - they reviewed the total script of the program for continuity, accuracy, and adherence to company policy. They had the overall responsibility for bringing the whole package together. They met with high echelon officials to discuss the development of programs.

⁷ Having found that the freelance producers do not responsibly direct, I do not reach the issue of “employee” status with respect to the crew and the talent who the Union alternatively contends are not “employees” within the meaning of Section 2(3) of the Act.

Finally, the Employer cites to two cases and argues that the Board also relies on secondary indicia as supporting evidence on questions of supervisory status. First, the Board's decision in *Poly-America, Inc.*, 328 NLRB 667 (1999), is inapposite. In that case, the Board found that the employer was liable for the statements in violation of Section 8(a)(1) of the Act because its dye shop leadman were found to be agents based on apparent authority. In the instant case, even if the Employer could show that the producers are "agents," they still are not supervisors absent evidence of their exercise of any primary indicia set forth in Section 2(11) of the Act. Second, the Employer's citation to *Hausner Hard-Chrome of KY, Inc.*, 326 NLRB 426 (1998), is not on point. In that case, the Board reversed the ALJ and found that the disputed department heads were not supervisors within the meaning of Section 2(11) of the Act because "their assignment and direction of work did not involve the use of independent judgment and their involvement in appraisals did not meaningfully affect employees' terms and conditions of employment."

It is well-settled that secondary indicia, without more, is insufficient to establish supervisory authority. *Springfield Terrace, LTD*, 355 NLRB 937 (2010). Accordingly, I find that the evidence of secondary indicia is not dispositive of the issue of whether the freelance producers are supervisors.

In conclusion, I find the instant case to be factually similar to the facts in *Westinghouse Broadcasting Co. (WBZ-TV)*, *supra*, wherein the Board determined the producer/directors were not supervisors on grounds that they functioned as part of an integrated production team, each member of which was independently capable of executing his assignment. Similarly, the record in the instant case establishes that the producers work within inflexible formats and their instructions to employees are routine in nature, involving little independent authority and are motivated by the artistic nature of the job. The producers do not have the authority to change work assignments, or effectively recommend assignment. Due to the extensive oversight of the senior producers, the producers are more akin to team leaders. Although most of the record dealt with the freelance producers' time in the field, I note that their time spent in the field – approximately one week out of twelve – is a small fraction of the overall duties of the producer. Further, as the Board observed in *Golden West Broadcasters –KTLA*, 215 NLRB 760 (1974), the mere absence of close supervision by a recognized supervisor over the production crew does not *per se* clothe the producer with the supervisory mantle. Rather, the Board found greater significance in the routine or artistic nature of the jobs performed by the producer and the crew than in the absence of detailed, direct supervision. *Telemundo De Puerto Rico, Inc.*, 113 F.3d 270 (1st Cir. 1997). Finally, the producer's participation in making or recommending personnel decisions is merely reportorial, sporadic and often ineffective.

Based on the record and Board case law, I find that the Employer has failed to meet its burden of showing that the freelance producers and run of show producers are supervisors within the definition of Section 2(11) of the Act and I shall include the freelance producers and run of show producers in the bargaining unit(s) found appropriate herein.

5. Accordingly, I therefore find that the following constitutes a Unit that is appropriate for the purposes of collective bargaining:

Included: All full-time and regular part-time freelance and “run of show” producers, associate producers and casting producers who meet the criteria of the stipulated eligibility formula: “run of show” employees in these classifications who were employed as of October 26, 2012, and all freelance employees in these classifications who worked 6 weeks or more in the 52 weeks prior to October 26, 2012. Employment in any workday in a given week constitutes one week of employment.

Excluded: All other employees, guards, professional employees, and supervisors as defined in the Act.

DIRECTION OF ELECTION

An election by secret ballot shall be conducted by the Regional Director, Region 2, among the employees in the unit found appropriate at the time and place set forth in the notice of election to be issued subsequently, subject to the Board's Rules and regulations. Eligible to vote are the following: all "run of show" employees employed as of October 26, 2012, and all freelance employees who worked 6 weeks or more in the 52 weeks prior to October 26, 2012. Employment in any workday in a given week constitutes one week of employment.

Also eligible are employees engaged in an economic strike, which commenced less than 12 months before the election date and who retained their status as such during the eligibility period and their replacements. Those in the military service of the United States who are in the unit may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the designated eligibility period, employees engaged in a strike who have been discharged for cause since the commencement thereof and who have been rehired or reinstated before the election date, and employees engaged in an economic strike which commenced more than 12 months before the election date and who have been permanently replaced.⁸ Those eligible shall vote on whether or not they desire to be represented for collective bargaining purposes by the Writers Guild of America East, Inc.⁹

Date at New York, New York
This 30th day of April 2013



Karen P. Fernbach
Regional Director, Region 2
National Labor Relations Board
26 Federal Plaza, Room 3614
New York, New York 10278

⁸ In order to assure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses that may be used to communicate with them. *North Macon Health Care Facility*, 315 NLRB 359 (1994); *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman Gordon Company*, 394 U.S. 759 (1969). Accordingly, it is hereby directed that within seven days of the date of this Decision, three copies of an election eligibility list, containing the full names and addresses of all eligible voters, shall be filed by the Employer with the Regional Director, Region 2, who shall make the list available to all parties to the election. In order to be timely filed, such list must be received in the Regional Office at the address below, on or before **May 7, 2013**. No extension of time to file this list may be granted, nor shall the filing of a request for review operate to stay the filing of such list, except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

⁹ Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request must be received by the Board in Washington by no later than **May 14, 2013**.